IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1923.

No. 524.

CITY OF OPELIKA, *Appellant,*

vs.

OPELIKA SEWER COMPANY, *Appellee*

Appeal from the District Court of the United States for the Middle District of Alabama.

BRIEF FOR APPELLANT.

Statement of Case.

Appellee Sewer Company brought suit in the Federal Court in Equity in Alabama against Appellant City of Opelika, and sought to have cancelled and annulled a schedule of maximum rates or charges for sewer service rendered by appellee to appellant and its inhabitants. The main if not the sole equity of appellee's bill was that the maximum rates or charges for sewer service collected by appellee Sewer Company were so low as to be confiscatory, and that for appellee to be compelled to perform the sewer service for such small compensation was to deprive it of its property without due process of law and in violation of the Fourteenth Amendment of the Constitution of

the United States. The principal theory upon which appellee proceeded in the lower court was that the appellant City of Opelika had fixed the schedule of maximum rates or charges for sewer service in the exercise of its governmental powers, granted or delegated to it by the Legislature of the State of Alabama; that consequently the rates or charges assailed were law fixed rates and were so low as to be confiscatory and therefore in violation of the Federal Constitution.

The City of Opelika disputed and denied the asserted equities in appellee's bill of complaint upon the ground that the bill, together with its exhibits, affirmatively showed that the maximum rates sought to be annulled were not law fixed rates, but were contractual rates, agreed to by and between the appellant and the appellee, and their respective predecessors in title and right, and consequently could not be confiscatory in the sense that a State law was in violation of the Fourteenth Amendment to the Federal Constitution. The City of Opelika, appellant, claimed and insisted in the lower court that the bill, together with its exhibits, affirmatively showed a lack of equity for that the charter of the City of Opelika, of which the court would take judicial knowledge and notice, conferred no power upon the City of Opelika to fix a schedule of maximum or other rates and charges for sewer companies or other public service corporations; and consequently the schedule of maximum rates and charges in question could not be law fixed rates for the reason that neither the City of Opelika nor its predecessor in title or right had any power or authority to fix any rates or charges for public service corporations, and that the bill and its exhibits affirmatively and conclusively showed that the maximum rates and

charges sought to be annulled were contractual rates and beyond the power of the court to cancel or annul.

The appellee Sewer Company, in reply to this contention of the City of Opelika, appellant, contended and sought to show that the ordinance contract (pp. 6-13 of printed record) which fixed the schedule of maximum charges for sewer service, and which was made an exhibit to the bill and admitted in the answer, was void because it was in violation of Section 22 of the Constitution of the State of Alabama, which provides: "No ex post facto law, nor any law, impairing the obligation of contracts, or making any irrevocable or exclusive immunities, shall be passed by the legislature; and every grant or franchise, privilege, or immunity shall forever remain subject to revocation, alteration, or amendment." The appellee Sewer Company therefore insisted that if the schedule of maximum rates and charges sought to be annulled should be held to be contractual, that the contract was void, in that it sought to grant an exclusive and perpetual right or franchise to the appellee Sewer Company, or its predecessor in title and right, in violation of the quoted provision of the Constitution of Alabama. The trial court ruled and decreed in accordance with the contention of the appellee Sewer Company, and sustained the equity of the bill.

The City of Opelika, appellant, then answered the bill of complaint, denying all of the asserted equities of the bill, setting up the facts which it claimed showed that the rates in question were contractual and not law fixed rates; that such rates were proposed by the appellee Sewer Company, and accepted by the City of Opelika; that in consideration of such rates or charges the City of Opelika granted to the Sewer Company,

or its predecessor in title and right, the franchise, right and privilege to construct, operate, and maintain a sewer system in the City of Opelika, and to use its streets, alleys and commons for such purposes; that the Sewer Company accepted the franchise, constructed and operated a sewer system in the City of Opelika and for the inhabitants of such city for a period of nineteen years without complaint that the rates or charges were too low, or that they were confiscatory, and that consequently the Sewer Company was bound by the contractual rates, and that it was therefore estopped from claiming that they were confiscatory, or that the City of Opelika had the authority or power to change or fix other rates or charges, much less that it was under the duty or obligation to fix higher rates or charges which the residents or inhabitants of Opelika should be required to pay for such service. The City also denied that the rates or charges in question were confiscatory.

The case was submitted on these issues, and a special master was appointed to take evidence as to whether or not the rates or charges were so low as to be confiscatory. Testimony was taken before the special master upon these issues, and he reported back to the court his findings to the effect that the rates were confiscatory. The City of Opelika reserved certain exceptions to the report. The court affirmed the report of the special master, granted the relief prayed, and from that decree the City of Opelika prosecutes this appeal.

The charter of the City of Opelika, which is a special act of the Legislature of Alabama, was introduced in evidence and appears in the record. (pp. 52 to 70 of printed record). The ordinance contract

which fixed the rates in question was made an exhibit to the bill, was admitted in the answer, and appears in the record (pp. 6 to 13). It is shown without dispute that the City of Opelika is the successor in title and in right to the District of Opelika, which is mentioned in the answer. It is also shown without dispute, and is admitted, that the Opelika Sewer Company is the successor in title and in right to the Sanitary Sewer Company of Philadelphia, Pennsylvania. There is no contention or dispute of the fact that the City of Opelika is in all respects the same as the District of Opelika; that it was a mere change of name of the municipality from that of the District of Opelika to the City of Opelika; nor is there any dispute or contention but that the Opelika Sewer Company is the successor to all the rights, authority and powers of the Sanitary Sewer Company; nor that all of the duties imposed upon the Sanitary Sewer Company are likewise imposed upon the Opelika Sewer Company.

Specification of Errors Relied Upon.

1. The decree of the District Court appealed from in this case is erroneous in that

(a). The bill alleged no sufficient facts to confer jurisdiction upon the District Court to hear or determine the controversy involved between the parties to the suit.

(b). Because the allegations of the bill fail to make a case of diverse citizenship, or a case arising under the Constitution or laws of the United States, or a case which involves a dispute or controversy as to the effect or construction of the Constitution or laws of the United States upon the determination of which the result of the suit depends.

(c). Because the bill of complaint fails to state any facts to present a suit which substantially and really involves a dispute or controversy between the parties to the suit as to any right which depends upon the construction of the Constitution or any law or treaty of the United States, or any other Federal question.

(d). Because all the allegations of the bill as to any Federal question involved are mere conclusions of the pleader, which conclusions are not justified nor supported by any facts, but, to the contrary, the facts alleged in the bill negative the conclusions of the pleader as to any Federal question claimed to be involved.

2. The decree of the District Court appealed from in this case is also erroneous in holding that the ordinance franchise involved in this case [see printed pages 6 to 13] violated Section 22 of the Constitution of the State of Alabama, which provides: "That no ex post facto law, nor any law, impairing the obligations of contracts, or making any irrevocable or exclusive grants of special privileges or immunities, shall be passed by the legislature; and every grant or franchise, privilege, or immunity shall forever remain subject to revocation, alteration or amendment."

3. The decree of the District Court appealed from in this case is also erroneous in decreeing that the schedule of maximum charges for sewer service set forth in the ordinance, copy of which is attached as Exhibit A to the bill of complaint in this case, and shown on pages 6 to 13 of the printed record, was a schedule of governmental or regulatory rates and not contract fixed rates for sewer service between the plaintiff and its assignor and this defendant.

4. The decree of the District Court appealed from in this case is also erroneous in assuming jurisdiction

to determine and in determining that the schedule of maximum charges for sewer service, as set out and specified in Section 6 of the ordinance franchise and made an exhibit to the bill of complaint in this case and as shown on pages 6 to 13 of the printed record, is confiscatory.

5. The decree of the District Court appealed from in this case is also erroneous in decreeing that the defendant, City of Opelika, had the power and authority, under its charter granted it by the Legislature of Alabama, as is shown on pages 52 to 70 of the printed record, to fix just and reasonable rates and charges for sewer service.

6. The decree of the District Court appealed from in this case is also erroneous in decreeing that the defendant was under a legal duty or could be compelled by a State or Federal Court to agree to or enforce the new or proposed schedule of maximum charges for sewer service, which are double the contract rates, as shown on page 16 of the printed record, and which are sought to be put into force and effect by this suit.

7. The decree of the District Court appealed from in this case is also erroneous in decreeing that an enforcement of the charges for sewer service, as set forth in the franchise ordinance, would be to deprive the sewer company of its property without due process of law and contrary to the Fourteenth Amendment to the Constitution of the United States, or that in the enforcing of such contract the sewer company would be denied equal protection of the law guaranteed to it by the Fourteenth Amendment.

8. The decree of the District Court appealed from in this case is also erroneous in decreeing that the City of Opelika had the power, under its charter,

which is shown on pages 52 to 70 of the printed record, to regulate or fix, by ordinance or otherwise, reasonable and just rates or charges for sewer service in the City of Opelika.

9. The decree of the District Court appealed from in this case is also erroneous in decreeing that the Sewer Company was entitled to the relief prayed for in the bill of complaint, which enjoined the City of Opelika from enforcing the contract rates fixed in the franchise ordinance, and in making perpetual the preliminary injunction granted in the cause.

Argument.

The trial court never acquired jurisdiction of the subject matter of this suit, for the reason that no Federal question was involved. The bill of complaint, together with its exhibits, affirmatively showed that the rates in question were contractual rates and not law fixed rates, and hence could not be confiscatory. The bill did not show any law of this State, or any ordinance, ruling or regulation of the municipality which had the force and effect of law, that deprived the complainant Sewer Company of its property without due process of law.

The power to fix rates and charges for public service corporations, or for businesses affected with a public interest, is a sovereign power, or, rather, an incident to sovereignty. Rates or charges for such public service companies are fixed and regulated only by the sovereign, or by some agency of the sovereign, such as a municipal corporation, or such board or commission created by the sovereign upon which the power to fix and regulate rates has been conferred or delegated by the sovereign. The authority or power of a

municipal corporation to provide a system of water works, electric lights, a sewer system, etc., does not necessarily carry with it the power to fix or regulate the rates or charges for furnishing water, lights or sewer service, to the city or its inhabitants. It requires an express grant by the sovereign to the municipality to confer the power to fix or regulate rates or charges, or the authority or power to fix and regulate must be conferred by necessary implication. The law is well settled in Alabama, and has been affirmed by the Supreme Court of the United States, that municipal corporations are strictly political institutions. Legislative sanction is therefore indispensable to their existence. They have no other capacity or power than that which is expressly conferred, or which is necessary to carry into effect the purpose of their creation. They are merely governmental agencies, organized by legislative enactment to share in the civil government of the country, but chiefly to regulate or administer the local or internal affairs of the city, town, or district which is incorporated. Whatever power they have is delegated to them by the State. Consequently, legislation which is permitted to be exercised by a municipal corporation is a mere delegation of the power of the State, and must be consistent with the laws of the State.

Railroad v. Dunn, 51 Ala. 128.

Mayor v. Wetumpka Co., 63 Ala. 611.

Municipal corporations, however, have two classes of powers: one, legislative or governmental, delegated by the Legislature which authorized or created the corporation, by virtue of which they control their inhabitants as a sovereign; the other power is a private, proprietary, or public power, by means of which they

act and contract for the private advantage of their inhabitants and for the municipal corporations themselves. In the exercise of governmental or legislative powers and functions the officers of a municipal corporation are trustees for the public, and with few exceptions they can make no grants or contracts which will bind the municipality beyond the terms of their office; but in the exercise of their private, proprietary or public powers it and its officers are controlled by no such rule, and they may lawfully exercise these powers in the same way as an individual, and in their exercise the municipality will be governed by the same rules which control and govern the individual or a private or business corporation.

Omaha Water Co. v. City of Omaha, 147 Fed. 1, 12 L. R. A. (N. S.) 736.

The record in this case, we insist, conclusively shows that the City of Opelika, in fixing the rates or charges for sewer service here in question, was exercising a private, proprietary, or business power, and not a legislative or governmental power. This, for the reason that the record conclusively shows that neither the City of Opelika nor its predecessor in title and right, the District of Opelika, ever had conferred upon it, either expressly or by necessary implication, the authority, power or right to fix rates or charges for any public service to be rendered it or its inhabitants by public service corporations or individuals who might perform such services which were affected with a public interest. The bill or complaint contained no express or necessarily implied allegation that the City of Opelika or its predecessor, the District of Opelika, ever had conferred upon it the power to fix or regulate rates or charges for public service corporations.

The charter of the District and the City of Opelika was introduced into the record (pp. 52 to 70) by the City of Opelika, and it of course speaks for itself; and in it cannot be found the delegation by the Legislature of the authority or power to fix or regulate rates or charges of any public service corporation, and certainly not for sewer service to be performed by the appellee or any other person or corporation furnishing sewer service to the City of Opelika or its inhabitants. The charter, however, does expressly confer the power upon the corporation to contract and to be contracted with for the purpose of obtaining necessary and proper supplies of water, light, gas and sewer service. (See p. 59 of record). The record, also, conclusively shows that the City of Opelika, or its predecessor in title and right, the District of Opelika, and the appellee, Opelika Sewer Company, or its predecessor in title and right, the Sanitary Sewer Company, did enter into a contract by which the appellant granted to the appellee the right and franchise to construct, operate and maintain a system of sewer service in the corporate limits of the City of Opelika, and to use its streets, alleys and commons for such purpose, and that in consideration of the right and privilege so granted the appellant agreed to furnish sewer service to the City and its inhabitants at not to exceed the stipulated maximum rates. (See pp. 6 to 13 of record). The record shows that these rates were proposed by the appellee, agreed to by appellant, and put into force and effect by an ordinance which is nothing more in effect than a contract between the appellant and appellee. In making this contract, in the passage of this ordinance, and in agreeing to these rates the City of Opelika was exercising

no legislative or governmental power, but was exercising its proprietary or business power for the use and benefit of the municipality and its inhabitants. This ordinance franchise, which specifies the schedule of rates or charges for sewer service, is shown on pages 6 to 13, inclusive, in the record. It is made an exhibit to the bill of complaint. It is the sole authority relied upon by appellee to operate a sewer system in the City of Opelika. Without the ordinance franchise, it is conceded that the appellant would have no right or authority to operate a system in Opelika, or to collect any rates or charges for sewer service from the City of Opelika or its inhabitants. It is the only ordinance or authority which the appellee Sewer Company has shown which authorizes it to charge or collect tolls, fees or charges for sewer service; and yet the bill of complaint prays, and the decree of the court grants the prayer, that the appellee Sewer Company may continue to operate and maintain its sewer system, and that it may collect twice the tolls, fees or charges which are provided for in its charter. (See p. 16 of record). In other words, the trial court decrees an enforcement of all the rights acquired by the appellee Sewer Company from the City of Opelika under and by virtue of its charter, and that it shall be paid twice the amount of compensation which its charter stipulated should be paid it for its service and in consideration of the rights acquired by its charter. It is difficult to understand how the trial court could read this charter granted by the City of Opelika to the Opelika Sewer Company and say that the rates provided for in the charter were not contractual rates. There is not an intimation in any provision of the charter that the rates or charges for sewer service

should be anything other than contractual rates. The entire ordinance, from beginning to end, the preamble, body, and every provision, shows conclusively that it is nothing but a contract between the City of Opelika and the Opelika Sewer Company, or their predecessors in title and right. The title or caption of the ordinance in part is to authorize the City of Opelika "to contract with the Sanitary Sewer Company, of Philadelphia, Pa., its successors and assigns, to build and operate" a sewer system. The preamble shows the considerations, reasons and inducements which led the City of Opelika to grant the franchise in question. It authorized the Sewer Company to lay pipes and conduits in the streets of the City of Opelika, and to maintain and operate them for a period of thirty years. In consideration of the Sewer Company constructing and operating a sewer system, the city agreed to forego its right to construct or operate a system, as it was authorized to do in its charter, during the life of the contract between the City and the Sewer Company. It provided how the sewer system should be laid and constructed and maintained. It provided that the Sewer Company should furnish the City of Opelika, free of charge, such sewer service as might be required for the City Hall and the County Courthouse so long as the City Council should have their office in the council chamber of the courthouse, the City School, and all other municipal offices; but in consideration of such free service the City agreed to pay to the Sewer Company a sum annually equal to all taxes and licenses on the sewer system due to the City. The franchise of the Sewer Company contained a schedule of maximum rates which the Sewer Company was authorized to charge. It was provided

that laundries, breweries, livery stables, ice factories, slaughter houses, and all connections of whatever description not enumerated in the schedule, should be charged special rates, and that all such special rates should be fixed by mutual agreement between the parties interested, and in proportion to the charges specified in the schedule. It was provided that after the expiration of ten years the City should have the right to purchase the sewer system at a price to be fixed by five disinterested appraisers. It also provided that the Sewer Company should submit to the City plans, specifications and survey for the sewer system, and that such plans should be approved by the City before the franchise right should become effective. It also provided that the City should pass ordinances with adequate penalties for the protection of the Sewer Company in the proper use of its system, and the necessary connections, catch-basins, manholes, and other appurtenances. It also provided that the Sewer Company should file with the Clerk of the City of Opelika its written acceptance of the franchise and its obligations, terms and conditions, and then expressly provided that thereafter such ordinance, the obligations, terms and conditions of it, "shall thereupon become and be a contract between the said Sanitary Sewer Company, its successors and assigns, and the District of Opelika." The City also gave its assent to a charter to be granted by the Legislature of Alabama incorporating the Sewer Company under the name of the Opelika Sewer Company, and when so incorporated it should become the assignee of the Sanitary Sewer Company as to all rights, franchises, privileges and contractual rights granted, but that it should be subject to all the obligations, liabilities, con-

ditions and disabilities imposed by the ordinance. It also provided that if the Sewer Company should at any time abandon or cease to operate the sewer system, the City might, by ordinance, declare the system of sewers abandoned, and that the City might take possession and control of the system and operate it. In other words, the franchise granted the Sewer Company contained a provision for its forfeiture. How it is possible for a court to construe this ordinance otherwise than a contract between the Sewer Company and the City of Opelika, is difficult to understand. It is and can be nothing but a contract in the form of an ordinance, that being the only way in which the City could contract. That the ordinance was a contract and intended as such is shown by the fact that the Sewer Company was required to accept or reject the ordinance, and it did accept in the following terms: "We hereby accept the franchise passed in our favor November 7, 1901, and the amendments thereto, passed November 19, 1901, and hereby agree to all the conditions contained therein," signed by the Sewer Company. (Page 30 of the Record). Surely the schedule of rates contained in the ordinance was a part of the conditions. And the 12th section of the ordinance provided that when the ordinance was accepted by the Sewer Company it should "thereupon become and be a contract between the Sewer Company, its successors and assigns, and the District of Opelika." (Page 12 of the record).

It is difficult to frame an argument to show that this ordinance was a binding contract between the City of Opelika and the Sewer Company, for the reason that the language is so plain and conclusive that

it is difficult to frame an argument more persuasive or conclusive than the very language of the ordinance.

Ga. Rwy. and Power Co., et al. v. Town of Decatur, U. S. Supreme Court.

Advance Opinion (1922-23) 669-673, 67 U. S. L. ed. and cases there cited.

Milwaukee, etc. Co. v. R. R. Com., 238 U. S. 174, 183, 59 L. ed, 1254.

The trial court, in its opinion, followed the reasoning in the case of *Denver v. Stenger*, decided by the Circuit Court of Appeals, December 29, 1921, 277 Fed. 865. With all respect for and deference to the opinion of the learned judge who decided this case, we are compelled to argue and say that the case which he followed ought not to be made an authority for the decision in this case, for the reason that the facts in the two cases are entirely different. The learned judge in this case quotes at length from the opinion in the case of *Denver v. Stenger, supra.* In that case the Circuit Court of Appeals held that the ordinances there in question "were not contractual in form nor in substance;" that the ordinances there in question to which references were then being made "granted the Tramway Company nothing. They were limitations upon the power of the Tramway Company to fix its own fares. So the Tramway Company accepted nothing that it was not compelled to accept if the fares were not confiscatory. We are of opinion, therefore, that they did not constitute contracts binding upon either party so far as the question of fares was concerned." The ordinance here in question is entirely different. It granted valuable rights, franchises and privileges to the Sewer Company. In fact, the ordinance itself granted the only rights the Sewer

Company had to operate a sewer system in the City of Opelika. The Sewer Company did accept this grant. It had the option to accept or reject, and it chose to accept, and operated the sewer system for the charges prescribed in the schedule for nineteen years without complaint. The ordinance here in question is wholly contractual in form. In the *Denver Case,* above, followed by the trial court, under the constitution and statutes of that State, as shown by the opinion of the Circuit Court of Appeals, the City of Denver had conferred upon and delegated to it the power to fix and regulate fares and charges of public service corporations, and the holding of the court in that case was that it was against the public policy of the State for a municipality to contract away its power of regulating and fixing rates of public utilities through the exercise of the police power. In the case at bar, the City of Opelika is shown to have no such power to fix or regulate rates as did the City of Denver. It only had the power to construct or provide a sewer system, which power, of course, carried with it, by necessary implication, the power to employ or hire others to provide the City with a sewer system. It had no power, expressed or implied, to fix or regulate the fees or charges of sewer companies, or any other public utility. Its entire charter is set out in the record, and in it nowhere can be found any expressed or implied authority to fix rates or charges for sewer service, otherwise than by contract with the sewer company, which it did, as is shown by the record. It is difficult to follow the reasoning of the trial judge in holding that the ordinance in question was void because in violation of Section 22 of the Constitution of Alabama, which

provides, among other things, "that no irrevocable or exclusive grants of special privileges or immunities, shall be passed by the Legislature; and every grant or franchise, privilege, or immunity shall forever remain subject to revocation, alteration, or amendment." The trial court argues and decides that the ordinance was void because it was an attempt to make an irrevocable and exclusive grant of special privileges; but yet it decrees that the ordinance shall be enforced, and the franchise rights of the Sewer Company preserved, but that it shall receive twice the consideration for its service that is required of it by the ordinance than was provided for and agreed to by the Sewer Company. If the ordinance or franchise was void because irrevocable or exclusive, it was just as irrevocable and exclusive when the Sewer Company was paid twice the charges for its services as it was when it received half that amount. In other words, the schedule of rates or charges which the Sewer Company was authorized to collect did not prevent the franchise from being irrevocable or exclusive. If the franchise was void because irrevocable or exclusive in violation of this provision of the Constitution, it was void *in toto*. The court could not declare it void in part and enforce it in part; it being a contract, agreed to between parties, the court could not modify it or make a new contract for the parties. The court must declare it void or valid *in toto*. Yet the effect of the decree of the trial court in this case is to hold the ordinance and franchise void, insofar as it attempted to provide a schedule of rates, but valid in all other respects. We insist that the court had no such power. Under the contract ordinance here in question, which granted the Sewer

Company its franchise, rights and privileges, the Sewer Company agreed to furnish, free of charge to the City of Opelika, sewer service for the City Hall, County Courthouse, and the City Schools; but in consideration of such free service the City agreed to pay to the Sewer Company annually an amount equal to all taxes and licenses of the sewer system due to the City of Opelika. (Bottom p. 8, top p. 9, of Record). Would it be contended by anyone that the court could require the City of Opelika to pay a sum annually equal to double the amount of taxes and licenses on the sewer system due to the City of Opelika? Surely if the court could require the City of Opelika and the inhabitants thereof to pay to the Sewer Company twice the amount agreed to in the schedule of rates forming a part of the charter, it could likewise require the City to pay a sum equal to double all taxes, instead of a sum merely equal to all taxes, paid by the Sewer Company to the District of Opelika. If the decision of the trial court is correct, then for the same reason the court could require the City or the patrons of the Sewer Company to pay twice the amount agreed to for all special rates. It will be observed that the ordinance contract, which forms the franchise of the Sewer Company, provides that laundries, breweries, livery stables, ice factories, slaughter houses, and all connections of whatever description not enumerated in the schedule, should be special rates, and that all special rates should be fixed by mutual agreement between the parties interested, but in proportion to the charges enumerated in the schedule. Now, if the court has the power to compel the City and the patrons of the Sewer Company to pay double the amounts enume-

rated in the schedule for service, which schedule was agreed to, then by the same reasoning the court could require the payment to the Sewer Company of double the amount which might be fixed by mutual agreement as to all special rates.

As above stated, the ordinance, considered as a whole, and nearly every provision in it, shows that it was nothing but a contract between the City and the Sewer Company; and that the rates and charges were agreed rates and charges, and not law fixed rates and charges. There is not a provision in the ordinance nor in the franchise which intimates that the charges were fixed by law, rather than by contract. In fact, every provision which refers to the tolls or charges for the service rendered expressly provides for contract or agreed rates. The schedule of rates fixed or enumerated in the ordinance only provides a maximum; that is, the Sewer Company is allowed to fix any rate or charge within the schedule, provided it does not exceed the maximum amount which is named or fixed in the schedule.

The trial court, in its opinion, quotes with approval from the opinion of the Circuit Court of Appeals in the case of *Knoxville Gas Co. v. City of Knoxville*, 261 Fed. 283, to the effect that "the power to fix rates to be charged by public service corporations is governmental and resides primarily in the State, and municipalities cannot exercise such power unless the State has in fact surrendered its power in that behalf. * * * It is a settled rule that a State surrender to a municipality of power irrevocably to fix rates for public service corporations must appear in explicit and convincing terms, and all doubtful expressions are to be resolved in favor of the State and

against the surrender of the power." We fully concur in this statement of the law. It is well stated by Mr. Dillon, in his work on Municipal Corporations, Vol. 3, Section 1325, where he says that "a city or other municipality has no power to regulate the rates to be charged by water, lighting, or other public service corporations, in the absence of express or plain legislative authority so to do," and cites many authorities in support of the text. We fully concur in this statement of the law, and invoke its application to this case. It is shown by this record that the City of Opelika has no power to fix or regulate the rates to be charged by public utilities; that the Legislature has not attempted to delegate to it such power or authority; and that the City has not attempted to exercise any such power or authority. It does not follow, however, by any means, that because a municipality has never been granted the authority and power to fix and regulate the charges for service by public utilities, that it has no power to contract for such services by such companies. It is well said by Mr. Pond, in his work on Public Utilities, Section 418, that "the power of the State to regulate municipal public utilities, which includes the power to fix and control the maximum rates they may charge for their services, however, is a sovereign power which our courts hold to be delegated to municipal corporations only in express terms or by clear or necessary implication." It is also well settled law that this right and power to fix and regulate rates may be delegated by the State to municipalities in the absence of a constitutional limitation prohibiting such delegation. It is also well settled law that the power of regulating rates is public and governmental in its nature, and in its operation

and effect, and is intended to redound to the benefit and advantage of the municipality and its inhabitants who receive the municipal public utility service, and the duty of regulating the service and fixing the rates, when delegated to the municipality, is personal and fiduciary in its nature, so that it cannot be surrendered or bartered away by transfer to another or by a contract suspending its exercise for an unnecessary or an unreasonable period. Indeed, the power is a continuous one, and is not exhausted by its exercise, although a certain rate may be fixed for a reasonable period which would constitute the established rate for such a period, and unless and until a rate is prescribed by a State or an agency to which the power may have been delegated, the public utility may fix its own rates for its service.—Pond on Public Utilities, Section 419. Where, however, the State has not delegated this right to the municipal corporation, but has conferred upon it the power of control over its streets, and authorized it to provide for municipal public utility service for itself and inhabitants, as is done in this case, the municipality has the power to install or operate the public utility plant so authorized, and has the power to fix and control the rates by making this a specification of the contract in which it grants to the public utility the special privilege of using the streets and furnishing service to the municipality or its inhabitants, as is done in this case. In regulating the service to be provided by a public utility and the rates to be charged therefor, it is of utmost importance to the public and to the consumers of the service that necessary provisions be made to secure adequate service at reasonable rates, as a condition of the consent granted by the municipality to the use of its streets by

the public utility; and for this purpose the City has ample power to regulate the service and control the rates of municipal public utilities in its own interest and that of its inhabitants, either by making the necessary provisions for doing so in connection with the grant of its franchise, or by provisions to that effect in a contract by which the municipality grants its consent to the public utility to use its streets and to supply its service within the municipality.—Pond on Public Utilities, Sections 420-22, inc.

The Supreme Court of the United States, in the case of *Cleveland v. Cleveland City R. R. Co.*, 194 U. S. 517, 48 L. Ed. 1102, held that under statutory authority conferred upon it to contract for street railway service, the City had the power to fix the rate for such service by an ordinance, and when accepted by the street railway company it became a contract, the court saying: "In reason the conclusion that contracts were engendered would seem to result from the fact that the provisions as to rates of fare were fixed in ordinances for a stated time, and no reservation was made of a right to alter; that by those ordinances existing rights of the corporation were surrendered, benefits were conferred upon the public, and obligations were imposed upon the corporation to continue those benefits during the time stipulated."

The Supreme Court of the United States also decided, in the case of *City of Detroit v. Detroit Citizens Railway Co.*, 184 U. S. 368, 46 L. Ed. 592, as follows: "It may be conceded that clear authority from the legislature is needed to enable the city to make a contract or agreement like the ordinance in question including rates of fare. But there can be no question in this court as to the competency of a State Leg-

islature, unless prohibited by constitutional provisions to authorize a municipal corporation to contract with a street railway company as to the rates of fare and so to bind during the specified period any future common council from altering or in any way interfering with such contract," citing a great number of authorities, and concluded as follows: "The contract once having been made, the power of the city over the subject, so far as altering rates of fare or other matters properly involved in and being a part of the contract, is suspended for the period of the running of the contract." Where a municipality has power to contract for the services of public utilities it can, in the exercise of such power or right, agree on a fixed rate for a reasonable period of time.—*Omaha Water Co. v. City of Omaha,* 147 Fed. 1, where it is held that in "the making of a contract for the construction and operation of waterworks, wherein the parties agree what rates may be collected by the owner from private consumers during a reasonable term of years, it is the exercise of one of the business powers of the corporation. *The purpose of such contract is not to regulate rates, for there are no rates to regulate. It is to procure water and to get rates for the city and its inhabitants.*" (Italics ours.)

In the case of *Los Angeles Water Co. v. City of Los Angeles,* 88 Fed. 720, it was said by the court: "In procuring water, or any other commodity by purchase, one of the first things to be considered and agreed upon is the matter of price. Therefore, to hold that the general power without limitation in a municipal corporation to supply the city with water does not include the power to agree upon price, it seems to me would be a solecism. * * * This delegation

of power to the city was not of course a relinquishment by the legislature of its control over the subject. The legislature could at any time revoke the power delegated to the city."

The power to fix rates for services to be rendered a municipality by a public utility has been frequently held to be properly included within the authority of the city to provide for such public utility or services of such companies. It was said by the Supreme Court of Michigan, in the case of *Boerth v. Detroit City Gas Co.*, 156 Mich. 654, 18 L. R. A. (N. S.) 1197: "It may be said, then, that in order to safeguard the rights of its inhabitants who use gas it is not only reasonable that the city should have this power to fix rates, but it is highly expedient; indeed it is necessary that it should possess that power. * * * *The power to prescribe rates by contract, and that is the power which was exercised in this case, is a very different power from the legislative power regulating rates.*" (Italics ours).

Where the municipality has the right to withhold its consent or extend it at will, it has ample power to make all necessary provisions for securing adequate service and reasonable rates, and when these terms and conditions are proposed by a city and accepted by a public utility company and complied with, they become a binding contract.—128 Ind. 531, 28 N. E. 88.

All the authorities hold that after the public utility has accepted the consent of a municipality or conditions specified in a charter or contract and installed its service, the contract is consummated, and where the conditions provided for fixing of rates as a material part of the contract, it is absolutely binding on the public utility. As was said by the Supreme Court of

Indiana, 142 Ind. 538: "The town had the right, in granting the use of its streets, to impose such reasonable requirements, terms, regulations and conditions therein, upon those accepting the privileges and benefits of the grant, as its own prudence and discretion might dictate, so as not to restrict, however, the town in its legitimate exercise of legislative powers." And the court then concluded: "The public utility having accepted the franchise granted by the ordinance and agreed to be bound by the express terms as to the price of gas, and having engaged in the exercise of the privilege under the grant, and so continuing to do, it is now precluded from successfully refusing to discharge its obligation to the inhabitants of the town who desire to use its fuel, upon the ground that they refuse to pay a price therefor in excess of the maximum rate fixed by the ordinance."

In the case of *Noblesville v. Noblesville Gas Co.*, 157 Ind. 162, 60 N. E. 1032, the court said:

"It would be doing violence to the rules of statutory construction to hold that under the law of 1887 the power of a city, when not reserved in granting a franchise, to prescribe the prices chargeable by its licensee to consumers of its gas, is free from fair and reasonable doubt." The court further said: "That the city had no power to regulate the rates of its licensee makes no difference. It had the power to contract. And the power to regulate as a governmental function, and the power to contract for the same end, are quite different things. One requires the consent of only one body, the other the consent of two. In this instance, the city acted in the exercise of its power to contract, and it is therefore entitled to the benefits of

its bargain." If this be sound law and reason—and it seems to us it is—it is conclusive in this case.

In the case of *Muncie Gas Co. v. City of Muncie*, 160 Ind. 97, 60 L. R. A. 822, the city had made a contract with the gas company to operate a natural gas system in said city and to supply gas at not to exceed the maximum rates stipulated in the contract. The gas company attempted to set up the defense that the contract was *ultra vires* the city, and therefore void, because no power was vested in it to enter into such a contract fixing rates to be charged its inhabitants for gas. The court held that since the company had continued to use the streets of said city for the distribution of natural gas to provide consumers by virtue of such contract, it was not within the power of the company to deny the right of the city to enter into such a contract; but in the course of the opinion the court expressed the belief that there was no lack of power in the city to make such a contract; that if the city had the right to grant the franchise it had the right to prescribe and impose the terms and conditions of the grant, and when they were accepted by the gas company, it became a contract. Judge Dillon, in his work on Municipal Corporations, Vol. 3, 5th Ed., p. 2234, says:

"After a valid rate has been fixed by competent authority, the rate so fixed is the limit of compensation which can be exacted by the corporation. It cannot decline to furnish water or light to a consumer at the rates fixed by law and insist that he shall contract therefor at another and a higher rate," citing *Osborne v. San Diego Land Co.*, 178 U. S. 22. The same author, in the same book, Section 1326, p. 2234, declares the law to be that when a municipality grants to a

public utility the right to use its streets for supplying the inhabitants with water, light, etc., and grants such public utility a franchise, that it may prescribe conditions and regulations under which the franchise shall be exercised, and that conditions and stipulations as to rates may be provided for in such contract and are binding, citing *Blair v. Chicago,* 205 U. S. 400; *Los Angeles v. Los Angeles,* 177 U. S. 558. The author also says that a maximum rate prescribed by such ordinance, when it is made a condition of the franchise, is binding upon the grantee of the franchise; that it cannot escape therefrom, and cites a great number of authorities in support of the text. He also says that a stipulation in a contract granting a franchise to supply private consumers at a rate not exceeding a designated amount, is a stipulation for the benefit of the inhabitants and may be enforced by them. These conditions and limitations, however, are intended to operate upon the corporation, the public utility; but whether they are binding upon the municipality, the State, or the public, the author says is quite a different question. The municipality having derived its power from the legislature, must contract, of course, subject to subsequent legislative control; but if the legislature has authorized the municipality to contract, in the absence of some constitutional restriction it may stipulate as to rates and provide that they shall not be reduced during the contract period, and in such cases it is held to constitute a valid, binding contract, protected by the Federal Constitution.—*Walla Walla v. Walla Walla,* 172 U. S. 1; *Los Angeles v. Los Angeles,* 177 U. S. 558, 570; *Freeport Water Co. v. Freeport,* 180 U. S. 587, 593; *Detroit v. Detroit,* 184 U. S. 368.

Judge Dillon, in his work on Municipal Corporations, 5th Ed., pp. 2242, 2243, Section 1326, says that the power to regulate rates is governmental, continuing in its nature, and that it cannot be bargained away, except by an express authority, and because of this principle, cases are to be found which deny the power of the municipality to contract that rates for public services shall remain unchanged for a term of years. The author adds, however, "but it is believed that a close examination of these cases establishes that they were either founded upon the peculiar facts and circumstances of the particular cases, or upon some reserved right by the constitution or statutes which subjected a rate prescribed by contract to future regulation by the legislature or by the municipality acting under delegated power."

Where a contract for a supply of water is innocuous in itself and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it.—164 U. S. 471, 163 U. S. 207; *Los Angeles v. Los Angeles,* 177 U. S. 558. In the last case it was held that though a city was without authority to make the contract, but as its action had been subsequently ratified, it was held to be equivalent to a prior original grant.

In the case of *Southern Iowa Electric Co. v. City of Chariton, et als.*, reported in 65 L. Ed. (U. S.) 764, *et seq.*, it was held that if a public service corporation and governmental agencies dealing with it, have power to contract as to rates and assert that power by fixing by contract the rates to govern during a particular time, enforcement of such rates is controlled by the obligation resulting from the contract, and hence

the question as to whether such rates are confiscatory becomes immaterial; and that confiscatory rates for services to be performed by a public service corporation may be enforced if secured by contractual obligations, but not if the rates are law fixed. That line of cases cited in the text must control the decision in this case. To this proposition, which we claim controls this case, Chief Justice White cites a great number of cases, including *Freeport v. Freeport*, 182 U. S. 587; *Detroit v. Detroit*, 184 U. S. 368; *Knoxville Water Co. v. Knoxville*, 189 U. S. 434; *Cleveland v. Cleveland*, 194 U. S. 519; *Columbus Railway, Light & Power Co. v. Columbus*, 249 U. S. 399.

We submit that under the law of Alabama there can be no doubt that the maximum rates fixed by the ordinance here in question were contractual by the obligations resulting from the contract, and that consequently whether such rates were confiscatory or not is immaterial. We submit that the following authorities are conclusive of this question.

Whenever a State court's construction upholds the existence of contract rights instead of denying them, the Supreme Court of the United States will follow the construction of the State court; but if the State court's construction denies the existence of the contract rights, the Supreme Court of the United States will review that construction. While of course no State court has construed the specific charter of the city or the specific ordinance contract in question, the Supreme Court of Alabama has construed a number of charters of Alabama cities similar to the charter of the City of Opelika here in question, and has construed and given effect to ordinances of such cities as the one here in question, and held that they did cre-

ate contractual obligations within the protection of the State and Federal Constitutions against impairing the obligation of contracts.

In the case of *Greenville v. Greenville Water Co.*, 125 Ala. 625-639, the charter of the City of Greenville, which was somewhat similar to the charter of the City of Opelika here in question, was construed, and the Supreme Court of Alabama held that, as a water supply was one of the necessities of a city, under the general authority to enact ordinances for the good order and welfare of the city granted to it, the City of Greenville had power to make proper contract for such water supply.

In the case of *Weller v. City of Gadsden*, 141 Ala. 642-656, the charter of Gadsden, which, for the purpose of this decision, was similar to that of Greenville and that of Opelika here in question, was construed, and the Supreme Court of Alabama, among other things, said:

"Whatever may be said as to the agreement to pay for hydrants at a fixed price for thirty years * * * it is settled that under a charter authorizing the city to make needful provisions to supply the city with water * * * its authorities may make such a contract, which will be valid, if not for the whole period, at least for a reasonable length of time," citing *Greenville v. Greenville, supra.*

In the case of *Mitchell v. Gadsden*, 145 Ala. 137, 157, the court construed the charter of the City of Gadsden and held that the city had the power to enter into a contract with a public utility; that case held that the making of such a contract between the city and the public utility was not delegation of governmental function, but was an exercise of its business

or proprietary power. The court further held in that case that it was one of the incidental powers of a municipal corporation to make such contracts with public utility companies for supplying water, and cited Dillon on Municipal Corporations, 4th Ed., 146, and *Livingston v. Pippin*, an old Alabama case reported in 31 Ala. 542.

Judge Dillon, in his latest edition on Municipal Corporations, 3rd Vol. 5th Ed., Section 1302, p. 2130, states the law to be that a city has authority to construct water, gas, or electric light works, whether it be derived from an express grant or from a general power of the city in respect to police regulations, preservation of public health, and concludes by saying: "Any power which is sufficient to authorize a city to provide a supply of water or light implies, in the absence of special restrictions, the power to make a contract with an individual or corporation therefor."

The case of *City of Bessemer v. Bessemer Water Works Co.*, 152 Ala. 391, construed the charter of the City of Bessemer, which is similar to the charter of the appellant City of Opelika, and those of the City of Gadsden and the City of Greenville above referred to, and the Supreme Court of Alabama held that the City of Bessemer had authority to contract for rates at which water should be supplied to its citizens for a definite period, and of consequence to suspend its charter powers in respect to the regulation of rates during such fixed periods. The Supreme Court said in that case that although the power was given the City of Bessemer to fix rates, that it was not an inhibition upon the city's power to contract for rates if that power to contract could be implied from express

power to contract for the supply of water, and the Supreme Court of Alabama held that the right of the city to fix maximum rates, if not expressly given, arose by necessary implication from the language with which the charter power to contract was clothed. The charter of the City of Bessemer authorized the city to make, erect or repair public mains, cisterns, hydrants, and to make all needful provisions by contract, ownership, or otherwise, for the supplying of its citizens with water.

In the case of *Birmingham Water Works Co. v. City of Birmingham,* reported in 211 Fed. 497, the District Court of the Northern Division of Alabama had under consideration the charter of the City of Birmingham, Alabama, and an ordinance of that City which fixed maximum rates which the water company could charge for the supply of water in the City of Birmingham. The charter of the city of Birmingham was not unlike the charter of the City of Opelika and those of other cities in Alabama which were created by special acts of the Legislature as to each city. While these charters of the various cities of Alabama above referred to are not identical, there is great similarity in all of them. Several of them are compared by Judge Grubb, of the District Court, in his opinion in the above styled cause. In that case Judge Grubb held that the charter powers of municipal corporations under the laws of the State creating them was a matter for the determination of State courts, which determination would be followed by the Federal court unless the construction of the State court conflicted with the proper enforcement of rights conferred, guaranteed, or protected by the laws of the United States; and, after reviewing many of the

decisions of the Supreme Court of Alabama construing the charters of municipalities very similar to the charter of the City of Opelika in question, Judge Grubb decided that where a municipal corporation was authorized to enact ordinances for the good order and welfare of the city, it was also authorized to contract with third persons or corporations to furnish water for the city or its inhabitants; and that where a city had entered into a contract with a water works company, held that the rates were valid and binding upon the city and the water works company for the period of thirty years prescribed in the ordinance granting a franchise and fixing the schedule of rates, and that where the city had contracted with the water company to furnish water at specified rates for thirty years, that a subsequent ordinance, modifying the original contract and establishing rates different from those originally specified, was void unless ratified by vote of the people, as authorized by the statute applicable to Birmingham. We recommend the opinion of Judge Grubb in this case to the consideration of this Court. It is a learned and convincing discussion of the rights and powers of municipal corporations in Alabama to make contracts with public utility companies as to rates to be charged by public utilities. It not only reviews the decisions of the Supreme Court of Alabama, but those of the Supreme Court of the United States; and holds that such contracts are valid unless prohibited by the Constitution or statutes of the State, declaring such contracts to be against the public policy.

The case of *Birmingham Water Works Co. v. City of Birmingham* was appealed from the District Court to the Circuit Court of Appeals and the decision was

affirmed, in 213 Fed. 450, by merely adopting the opinion of Judge Grubb in the District Court. The only material difference between that case and the case at bar is that in that case the contract was to supply water, and in this it is to supply sewer service, and in that case the city attempted to avoid the contract and declare the rates void, while here the public utility company seeks to avoid the contract and to declare the rates void.

The Alabama cases reviewed by Judge Grubb have since been followed and re-adopted by the Supreme Court of Alabama in the case of *Mobile Electric Co. v. City of Mobile,* reported in 201 Ala. 607. In that case the electric light company, like the sewer company in this case, claimed that the schedule of rates imposed and collected by the City of Mobile was so low as to be confiscatory, and the electric light company attempted by force to put in higher rates, as did the sewer company in this case. In the Mobile case, however, the City of Mobile anticipated the electric light company in its attempt, and it filed a bill in equity to enjoin the light company from establishing and adopting a new proposed schedule of rates for electric light service in Mobile; whereas, in this case the sewer company filed its bill to enjoin the city from continuing to collect the rates fixed by the ordinance franchise and contract and to compel the city and citizens to pay double the price originally proposed by the sewer company, as a new schedule of rates. In that case the Supreme Court of Alabama held that the City of Mobile had authority to contract for furnishing electricity to its inhabitants for a fixed and reasonable period at rates specified in the contract, and that such contract was protected under the inviolable

contract clauses of the State and Federal Constitutions, and that although the contract might provide that the rates should be perpetual, that such rates would be enforced during a period of thirty years, in analogy to Section 228 of the Constitution of Alabama, which limits the term of franchises to that period. The court also held that the city could maintain a bill to enjoin the electric company from increasing rates as to its citizens, notwithstanding the citizens could redress the wrong individually or collectively. Consequently, it appears that the decisions of the Supreme Court of Alabama are unanimous to the effect that a municipality may contract with a public utility to furnish the city and its inhabitants with water, light, gas, etc., and that such contracts are valid and binding both upon the city and the public utility for the period of time fixed in the contract, unless prohibited by the Constitution or the statutes, We submit that, if the City of Greenville and the City of Gadsden and the City of Bessemer and the City of Mobile and the City of Birmingham had authority, under their respective charters, to make a contract with a public utility, and in its contractual capacity to fix the rates or charges for such public service to the respective cities and the inhabitants thereof, then the City of Opelika had authority to pass the ordinance here in question and to fix the maximum schedule of rates which was fixed in the ordinance, and that the rates so fixed were contractual or agreed rates, and not law fixed rates, and that the fact that they might be confiscatory was unimportant, and consequently conferred no jurisdiction upon the District Court to declare them void or to compel the City of Opelika to approve other and different rates proposed by the Sewer Company. It

is true that none of the Alabama cases cited involved the question of the right of the city to provide for sewer service, but that each dealt with the right of the city to contract with public utilities for water, lights, or gas; but the same principle will apply to the right of the city, with similar charter provisions, to contract for sewer service and to agree upon rates or charges for such service, for, as was said by the Supreme Court of California, in *McBean v. Fresno,* 112 Calif. 159, 31 L. R. A. 794, 53 Am. St. Rep., 191, "Proper sewers are in this day so essential to the hygiene and sanitation of a municipality that a court would not look to see whether a power to contract and maintain them had been granted by the charter, but, rather, only to see whether by possibility the power had been expressly denied." See, also, Pond on Public Utilities, Section 40. Moreover, Section 11 of the charter of the City of Opelika, as shown on page 59 of the record, and which is quoted by the trial judge in his opinion, as appears on page 77 of the record, expressly provides that the city should have power to establish and build drains, sewers, conduits, reservoirs, and to regulate the same and to authorize the use of the streets and to maintain the health and cleanliness of the city and to this end to adopt and maintain an efficient system of sewerage, and to adopt such ordinances and regulations as it might deem necessary or expedient for the protection of health and to maintain a good sanitary condition in public places and all private premises; so it is not necessary to resort to implied power. Here the city is given express power to do everything that it has done. It has been repeatedly held, by numerous courts and textwriters, that the grant to a municipality of the power to con-

tract or maintain a water, light, gas or sewerage system, necessarily carries with it the power to contract with individuals or corporations to provide the city and its inhabitants with water, light, gas, or sewerage systems. The right to contract with such person or corporation for such services of course necessarily implies the power to agree upon rates, tolls, or charges for such services.

We respectfully submit that counsel for the Sewer Company, and the trial court, have incorrectly construed the charter of the City of Opelika as well as the ordinance franchise which prescribes the schedule of rates complained of in this case. All of the authorities relied upon by counsel, and by the trial court, holding that such rates were void, were cases in which the municipality was exercising its legislative or governmental powers, and not where it was exercising its business or proprietary powers. The distinctions between the two lines of cases have been repeatedly pointed out, both by textwriters and by the courts; and consequently the fatal error into which counsel for the Sewer Company, and the trial court, have fallen, is that they have attempted to bring this case within the rule of those cases in which the municipality had fixed rates, while in the exercise of its legislative or governmental powers which were delegated to it by the Legislature, and have failed to assign the case made by the record to the class to which it in fact and law belongs,—that class of cases in which the municipality has contracted with individuals or corporations to furnish supplies of water, light, gas or sewer service, at agreed or contractual rates. These two classes of cases were well pointed out by Chief Justice White, in the case of *Southern Electric Co. v. Chariton*, and

other similar cases reported in 65 L. Ed., p. 764, and 255 U. S. 539. In that case the Chief Justice said:

"Where, however, the public service corporations and the governmental agencies dealing with them have power to contract as to rates, and exert that power by fixing by contract rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and therefore the question of whether such rates are confiscatory becomes immaterial," citing a great number of cases, among which is the case of *Columbus Railway Power & Light Co. v. Columbus*, 249 U. S. 399, 39 S. C. Rep., p. 349. In that last case the opinion was written by the lamented Mr. Justice Day, and it was there decided that where the ordinance of Columbus granted the street railway a franchise for a fixed term of years and it was accepted by the grantee, that it constituted a binding contract, the obligation of which the company could not avoid on the ground that the increased operating expenses, due to the war and higher wages fixed by the War Labor Board, made it unprofitable. The argument of the railway company in that case was identical with the argument of the Sewer Company in this case. Justice Day says:

"The theory upon which the bill was framed, and the case argued here by appellant, is that the grants were legislative in character, and gave to the Railway Company the right and privilege of using the streets of the City for a period of twenty-five years; that to compel their operation at unremunerative rates is to take the property of the Company without due process of law in violation of the Fourteenth Amendment. The insistence on the part of the City is that under the controlling laws of Ohio, in force when

these ordinances were passed and accepted, and the terms of the ordinances, binding contracts were created, obligating the City, which had authority from the State for that purpose, to permit the operation by the Company upon the streets of the City for the period of twenty-five years upon the terms and conditions set forth in the ordinances."

This is a good statement of the facts in this case, *mutatis mutandis*. Justice Day, in answering these respective contentions, said:

"That a city, acting under state authority, may in matters of proprietary right make binding contracts of the nature contained in these ordinances, is well established by the adjudications of this court, citing *Vicksburg v. Vicksburg Waterworks Co.*, 206 U. S. 496, adding "Whether these ordinances constituted such contracts depends upon the proper construction of the statutes of Ohio in force at the time, and the terms of the ordinances in question," and concluded that the ordinances did constitute a contract under the laws of Ohio. We have cited a number of cases showing construction of the Alabama statutes to the effect that such ordinances, under the laws of Alabama constituted a contract. After stating the contention of the public utility that the ordinances did not constitute a contract, but were legislative in their character so far as they fixed rates, and after discussing the insistence that the contract had become too onerous for the public utility to perform it unless the rates were increased, Justice Day said:

"It certainly was not intended to question the principle, frequently declared in decisions of this court, that if a party charge himself with an obligation pos-

sible to be performed, he must abide by it unless performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties will not excuse performance. Where the parties have made no provision for a dispensation, the terms of the contract must prevail."

In the case of *Day v. United States,* 246 U. S. 159, it is said:

"One who makes a contract never can be absolutely certain that he will be able to perform it when the time comes, and the very essence of it is that he takes the risk within the limits of his undertaking."

It was claimed in the case of *Columbus Railway, Power & Light Co. v. City of Columbus, supra,* that the happening of subsequent events, the world war, and the great increase in wages by the arbitral award of the War Labor Board relieved the utility from performing the contract at the agreed rates; but this contention was denied effect.

Counsel for the Sewer Company in the court below —and we suppose they will again in this court—relied upon the case of *San Antonio v. San Antonio Public Service Company,* 255 U. S. 647, 65 L. Ed. 777, 41 S. C. Rep. 428. The trial court also cited and relied upon it in holding that the ordinance franchise contract in this case was void because in violation of Section 22 of the Constitution of Alabama. That case is not and ought not to be made an authority in this case, for the reason that the facts in the two cases are entirely different. If the City of Opelika in this case, in passing the franchise ordinance here in question, had been exercising its governmental or legislative powers in fixing rates for public utilities, then we concede that the case of

San Antonio v. San Antonio Public Service Co., 255 U. S. 647, 65 L. Ed. 777, 41 S. C. Rep. 428, would be an authority to support the decision of the trial court in this case; but, as the City of Opelika, in this case, in passing the ordinance franchise in question, was acting in its private, business or proprietary capacity, and not in its governmental capacity, the above case cannot and ought not to apply or control the decision in this case. We submit that the facts in that case showed as conclusively that the City of San Antonio was exercising its governmental or rate making power in passing the ordinance there in question, as it is clearly shown in this case that the City of Opelika was exercising its private, business or proprietary power in passing the ordinance franchise in this case. The opinion of Chief Justice White in the San Antonio case clearly and repeatedly makes the case turn upon the question as to whether or not the City of San Antonio was exercising its governmental power in fixing rates, or whether it was exercising its private, business proprietary power in contracting for rates. In fact, he says: "Was the ordinance of 1899, fixing the five cent rate, a contract?" The opinion held in effect that if it was a contract it was binding upon the public utility, and if it was not a contract, but was an ordinance fixing rates, then it was not binding upon the utility, and consequently the duty rested upon the City of San Antonio to fix reasonable rates in excess of the five cent fare. Chief Justice White in his opinion in that case makes it clear, certain and beyond doubt that the ordinance there in question was an exercise of the city's governmental or law making power, and not a private or business capacity. In that case the ordinance in question expressly provided that the

city "shall hereafter have the right to pass all ordinances not in direct conflict with the laws of this State fixing and regulating the rates, prices and terms at which gas and electricity shall be furnished for public and private purposes to the city and its inhabitants." As pointed out by Chief Justice White in the opinion in that case, it had theretofore been decided that the rate then in question was not a contract rate, and that it could be modified by the city. Likewise, there was no question in that case—in fact, it was not disputed—that the State of Texas had conferred upon the City of San Antonio the right to fix rates and charges for public utilities.

Let us compare and contrast the facts in this case with the facts in that case. Here the State of Alabama has never conferred upon the City of Opelika the power to fix rates or charges as for any public utility, sewer company or others. At the time the contract ordinance here in question was passed there was no occasion to fix rates for sewer service. There was no public service sewer company. The ordinance here in question was nothing but a contract between the city and the public utility company to provide a sewer system for the City of Opelika and its inhabitants. The schedule of rates in question was proposed by the Sewer Company, accepted or agreed to by the City, and written into the ordinance, and the ordinance was accepted in writing by the Sewer Company after it was ordained and passed. It has none of the earmarks of a law; but has all the earmarks of a contract. The ordinance speaks of itself as a contract. It recites that the company accepts it as a contract. It provides that the City shall aid the Company in the enforcement of it as a contract. It

even provides the conditions and mode of forfeiture as a contract. There is never an intimation in it that either the city or the company had the power to change the rates. It even gave the city an option to purchase the plant and take over the whole works after ten years. Not a single one of these contract provisions are to be found in the San Antonio ordinance; but as before stated, the ordinance itself expressly provides that the city has power to change or regulate the rates and charges. We concede, of course, that if the facts in this case were the same or even similar to the facts in the San Antonio case, the decision of the trial court would be correct, and that we would have no standing in this court on appeal; but we insist and we believe that the records in the two cases show without dispute that the facts are entirely different, in that the rates in the San Antonio case were law fixed rates, whereas in this case they are contract fixed rates. The authorities in the two lines of cases, one, where the rates are fixed by law, and another, where they are fixed by contract, are collected in a note to the case of *Columbus Ry. Co. v. City of Columbus*, 249 U. S. 399, 63 L. Ed. 669, 39 S. C. Rep. 349, reported in 6th Am. St. Rep., p. 1649.

We submit that the authorities, both textbook and adjudicated cases, have settled the law to the effect that a municipality, in the absence of any direct action by the State, may enter into a contract with a public utility whereby the rates to be charged are fixed and become a contract as between the parties and which is binding upon both parties, but notwithstanding this the State has power, which it may delegate, to increase or diminish such rates whenever public necessity demands it. In other words, franchise rate contracts are

not such contracts as may not be increased by the State without infringing the constitutional guaranty. Such franchise contract must be deemed to have been entered into with a knowledge of the inherent and reserved power of the State to alter such contract when necessary so to do for the public welfare; and municipalities are merely agents of the State, and the State may at any time waive the rights of the municipality in the contract. Such contract rates, however, between a municipality and a public utility are binding on both parties until changed by the State, acting through its legislature or through some delegated power. We submit that it has been uniformly held by the State and Federal authorities that where a valid contract exists between a public utility company and a municipality for the furnishing of a stipulated service at a stipulated price, the public utility cannot be released of the obligations of the contract and the rates increased because of the changed conditions existing at the present time rendering the performance unprofitable.

In the case of *Muscatine Lighting Co. v. Muscatine*, 256 Fed. 929, the court said:

"It must be apparent that if the confiscatory rate is fixed not by the municipality but by the utility company (and such is the case here) the State has done no act depriving the company of its constitutional rights. It must likewise be apparent that if the rate is the joint act of the utility company and the city, if the utility company has consented to the rate (and such is the case here) it has waived the constitutional rights which it might otherwise assert." The court also said in the Muscatine case that if a rate was fixed by agreement which, at the time, was reasonable, but which af-

terwards became confiscatory without any act of the State, but simply as the result of industrial conditions, that the prohibition of the Fourteenth Amendment upon the State is not violated; that so far as the income and profits of a utility corporation are concerned, where the rates are fixed by contract and not by law, the utility company was in the same position as a building corporation or a state improvement company. The court said: "It may make money; it may lose money. *But only when the State has acted affirmatively to the deprivation of reasonable income upon actual investment can constitutional guaranty be invoked.*" (Italics ours). If a rate of a utility company is fixed by contract between it and a municipality, so far as the parties to the contract are concerned the positions of the parties are not different from that of other contractors who have agreed to supply articles the cost of which has been greatly enhanced by war or industrial conditions. A utility company in such case is bound by the contract just as any other contractor, though performance results in loss.—*Berg. v. Erickson,* 234 Fed. 817, L. R. A. 1917A 648. In the last case Judge Sanborn says that in some of the State courts a rule had been developed that when conditions arise of such character that the court can see that they were not within the contemplation of the parties, such a change of situation will excuse the violation of the contract; but the judge said: "But no decision of the Supreme Court or of any Federal court to this effect has been cited or discovered which goes so far, and the rule adopted by the Supreme Court which must prevail here is otherwise." He concludes by saying that "the question has been directly passed upon and contracts much more

inequitable than the one here involved were reviewed in the following cases," citing *Rutland Marble Co. v. Ripley*, 10 Wall. 339; *Franklin Telegraph Co. v. Harrison*, 145 U. S. 459; *Guffey v. Smith*, 237 U. S. 101. It has been decided by the State and Federal Courts that in determining whether equitable relief should be granted with respect to contracts between utility companies and municipal corporations as to rates and charges, the court must place itself in the position occupied by the parties at the time the contract was made, and not at the time at which it is to be performed. If at the time it was made the contract was fair and free from fraud, mistake or imposition, parties must be left free to make their contracts, and it is the duty of the court to enforce them as made.

Argue this case as we may, it finally comes back to the question whether or not the ordinance franchise which granted the Sewer Company the right to construct and operate a sewer system in Opelika, and which contained the schedule of rates here in question, was a valid contract between the City of Opelika and the Sewer Company. If it is a valid contract, and we insist and believe we have shown that it is, then there is no equity in the bill of the Sewer Company and the prohibition of the Fourteenth Amendment upon the State is not violated. On the other hand, if this ordinance franchise was not a contract, but was a law fixed rate or regulation for sewer service in the City of Opelika, and there is equity in the bill, and if the rates are confiscatory the decree of the court is correct. We believe that we have demonstrated that the ordinance is nothing but a contract between the City and the Sewer Company; that the schedule of rates contained therein is a part of the con-

sideration of the contract; and that the rates are binding upon the Sewer Company, and that the mere fact that, because of industrial conditions, the rates are not remunerative, gives equity no jurisdiction to grant relief and that no Federal question is involved, for the reason that the prohibition of the Fourteenth Amendment insisted upon is not violated. We believe that this is shown by reason of the following facts and principles of law which we insist are not disputed: that rate making is a sovereign power; that municipalities are not presumed to possess this power; that the power must either expressly or by clear implication be conferred by the legislature; that the charter of the City of Opelika does not confer, either expressly or by clear implication, any power upon the municipality to fix rates, but that it does authorize the city to contract for sewer service, which includes the power to agree upon rates.

We have cited several decisions of the Supreme Court of Alabama which construed charter provisions similar to those contained in the charter of the City of Opelika, and that construed franchise ordinances similar to the one here in question; and in every instance the Supreme Court of Alabama has held that the franchise ordinance there in question was a valid contract between the municipality and the public utility then in question. The Federal Court, in an opinion written by Judge Grubb in the case of *Birmingham Water Works Co. v. City of Birmingham*, 211 Fed. 497, reviewed the Alabama decisions and concurred in the correctness of those decisions and followed them. His opinion was affirmed by the Circuit Court of Appeals in 213 Fed. 450. We submit that the Supreme Court of the United States, construing similar charters of

statutory provisions regulating municipalities and similar ordinances granting franchises to public utilities, has held that franchise ordinances like the one in question are valid and enforceable contracts between the municipalities and public utilities, and the mere fact that the rates, on account of industrial conditions, may become unremunerative, or even confiscatory, does not give equity jurisdiction to relieve against them, and that a bill seeking to relieve the utility company from the enforcement of such contract rates presents no Federal question. Not a single case cited or relied upon by counsel for the Sewer Company in the court below, and not a single one cited or relied upon by the trial court in his opinion, is applicable or ought to control in this case if the ordinance franchise here in question was a valid contract between the parties. Such cases so cited and relied upon by counsel for the Sewer Company and by the court are applicable and are applicable only in the event that the rates mentioned in the ordinance franchise in question are law fixed rates. Consequently, as stated above, the correct decision of this case must depend upon a construction of the franchise ordinance here in question. If the schedule of rates mentioned in that ordinance is contractual and the contract is valid, then there is no equity in this bill. On the other hand, if they are law fixed rates, and such rates are confiscatory, then there is equity in the bill and the decree of the trial court is correct. We insist, however, that the bill in this case, on its face, fails to show that the rates in question are law fixed rates. It fails for the reason that it does not show by express allegation or by necessary inference that the City of Opelika has ever had conferred upon it the sovereign or legislative power

to fix rates. We insist that the bill utterly fails to show any attempt on the part of the city to exercise the sovereign right or power of fixing rates for public utility companies. We insist that the allegations of the bill, considered in connection with the exhibits thereto, including the ordinance franchise in question, affirmatively and conclusively show that the rates complained of were contractual, and hence there was not equity in the bill.

If the schedule of rates fixed for sewer service in this case is inadequate, and is, as matter of fact, confiscatory, it is evidently due to a change of circumstances and conditions for which the City of Opelika is no more responsible than is the Sewer Company. Surely it will not be contended that this schedule of rates was too low, or was confiscatory, when it was established, for the reason that the schedule was made out by the Sewer Company itself. They were rates which were first proposed by the Sewer Company; and it did install and operate the sewer plant in accordance with the ordinance contract in consideration of the payment of the schedule of charges fixed. Such rates were agreed to by the City and were incorporated in the ordinance and the ordinance was formally accepted in writing by the Sewer Company; and consequently it became a binding contract, as much so as any contract could ever become binding upon the parties. If the costs of labor and material should have decreased during the life of this contract, rather than increased, the Sewer Company would never have made any complaint. The fact that the rates were not confiscatory or too low when established is conclusively shown by the fact that the Sewer Company has operated under the schedule for nineteen years, and it

operated under it for eighteen years without complaint. If the allegations of the bill, that the Sewer Company is operating at a loss, be true, it must bear the loss or forfeit its charter by failing to perform the duties and conditions imposed upon it by the contract. In fact, such forfeiture is expressly provided for in the ordinance and is a part of the contract. Consequently, its remedy and relief from its present condition is provided for in the contract.

It is possibly proper for us to say in this brief that prior to the present Constitution of Alabama, that of 1901, most of the towns, cities, and municipalities in Alabama were incorporated under and by virtue of special acts of the Legislature, which incorporated the municipality and conferred upon it all of its rights and powers and granted it all of its privileges and immunities and imposed upon it all of the duties. Since the Constitution of 1901, municipal corporations are now incorporated under general laws, special laws creating such municipalities being prohibited for the first time by the Constitution of 1901; but the Constitution of 1901 did not have the effect of destroying the charters of existing municipalities which were created by special act, but they were continued in existence, with provisions that the charter could be amended under general laws to be provided thereafter. It is not contended that there are any general laws of this State which in any manner influence or control the correct decision in this case. The special act of the Legislature of Alabama, which is set out at length in the record in this case, is the sole law of Alabama, save the provisions of the Constitution of Alabama, and those of the Constitution of the United States, which can and should control or affect the correct de-

cision in this case. We contend and believe that an examination of the charter of the City of Opelika, together with the ordinance granting the franchise to the Sewer Company, will convince the court that the rates the enforcement of which the Sewer Company seeks to enjoin, are contractual and agreed rates and not law fixed rates; that the City of Opelika, in fixing or agreeing to such rates, was exercising its business or proprietary power, and not its legislative or governmental power; and that consequently the question as to whether the rates are confiscatory or not is wholly immaterial. If we be correct in this conclusion, then the trial court acquired no jurisdiction, for the reason that no Federal question was involved; there was no equity in the bill of complaint, and the case presented no equitable cause of action; and the decree of the lower court should be reversed and a decree here rendered dismissing the bill at the costs of appellee.

Respectfully submitted,

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